



INSPECTOR GENERAL  
DEPARTMENT OF DEFENSE  
400 ARMY NAVY DRIVE  
ARLINGTON, VIRGINIA 22202-4704

OCT 26 2010

MEMORANDUM FOR MAJOR GENERAL MARY A. LEGERE, U.S. ARMY,  
COMMANDING GENERAL, ARMY  
INTELLIGENCE AND SECURITY COMMAND,  
FORT BELVOIR, VA

SUBJECT: Investigation under 5 U.S.C. § 2302(b)(8)

We recently completed our investigation into allegations that Mr. James M. Helms, a former Intelligence Specialist at the Fort Knox field office of the 902nd Military Intelligence Group, received an unfavorable personnel security determination because of his whistleblowing activities.

We substantiated the allegation that Agency officials reprised against Mr. Helms when recommending that his security clearance be revoked. We concluded that the Agency did not establish by clear and convincing evidence, a firm belief, that it would have taken the same action absent Mr. Helms' disclosures. Our report of investigation is attached.

We recommend that you consider an appropriate remedy with respect to Mr. Helms. If you have any questions, please contact me or Mr. John Hickey, Acting Director, Civilian Reprisal Investigations, at (703) 604-8613.

A handwritten signature in black ink, appearing to read "Donald M. Horstman", is positioned above the printed name.

Donald M. Horstman  
Deputy Inspector General for  
Administrative Investigations

Attachment:  
As stated

cc: Mr. James M. Helms



**INSPECTOR GENERAL**  
**DEPARTMENT OF DEFENSE**  
**400 ARMY NAVY DRIVE**  
**ARLINGTON, VA 22202-4704**

Ref: 11-00016-FP  
November 15, 2010

OCCL

Mr. James M. Helms  
306 South Atcher Street, Apt #2  
Radcliff, KY 40160


Dear Mr. Helms:

This is in response to your October 26, 2010, Freedom of Information Act (FOIA) request seeking "*the completed DoDIG, CRI investigation concerning myself, James M. Helms*". We received your request on October 27, 2010, and assigned it FOIA case number 11-00016-FP.

Please find enclosed the document you requested. I am, however, withholding portions of these records under the provisions of Exemptions 6 and 7(C) of the FOIA, specifically, 5 U.S.C. § 552 (b)(6), which pertains to information, the release of which, would constitute a clearly unwarranted invasion of personal privacy and 5 U.S.C. § 552(b)(7)(C), which pertains to information compiled for law enforcement purposes, the release of which could reasonably be expected to constitute an unwarranted invasion of the personal privacy of third parties.

If you are not satisfied with this action, you may submit an administrative appeal to Mr. John R. Crane, Assistant Inspector General, Office of Communications and Congressional Liaison, Room 1021, 400 Army Navy Drive, Arlington, VA 22202-4704. Your appeal should be postmarked within 60 days of the date of this letter, should cite case number 11-00016-FP, and should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

  
Jeanne Miller  
Chief, Freedom of Information and  
Privacy Office

Enclosure:  
As stated

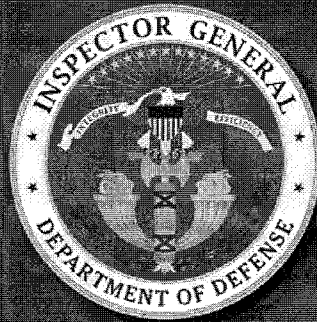
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Report No. CRI-HL 108920

October 26, 2010

# Inspector General

United States  
Department of Defense



APPROPRIATED FUND EMPLOYEE  
WHISTLEBLOWER REPRISAL INVESTIGATION

902ND MILITARY INTELLIGENCE GROUP

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We substantiated the allegation that Agency officials reprised against Mr. Helms when recommending that his security clearance be revoked. We concluded that the Agency did not establish by clear and convincing evidence, a firm belief, that it would have taken the same action absent Mr. Helms' disclosures. Our report of investigation is attached.

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Donald M. Horstman  
Deputy Inspector General for  
Administrative Investigations

Attachment:  
As stated

cc: Mr. James M. Helms

APPROPRIATED FUND EMPLOYEE  
WHISTLEBLOWER REPRISAL INVESTIGATION

Mr. James Michael Helms

INTRODUCTION AND SUMMARY

We initiated this investigation in response to a Defense Hotline complaint received on January 12, 2009, from Mr. James Michael "Mike" Helms, a former GG-13 Intelligence Specialist, 902nd Military Intelligence (MI) Group, Fort Meade, MD. Mr. Helms was referred to the Office of the Inspector General, Department of Defense (DoD IG), Civilian Reprisal Investigations Directorate (CRI), after he filed a whistleblower reprisal complaint with the DoD Hotline.

Mr. Helms alleged that he suffered seven acts of reprisal for making 14 disclosures. This report addresses only Mr. Helms' Defense Hotline complaint alleging:

1. the suspension of his access to classified information was in reprisal for making multiple disclosures; and
2. the recommendation to revoke his clearance was in reprisal for making multiple disclosures.

His remaining allegations of reprisal that concern other adverse personnel actions are before the U.S. Merit Systems Protection Board (M.S.P.B.) which lacks jurisdiction to review security clearance determinations as personnel actions.

Mr. Helms' disclosures pertained to alleged violations of DoD rules regarding the medical treatment afforded to civilian employees injured in combat during Operation Iraqi Freedom, matters Mr. Helms reasonably believed evidenced a violation of law, rule, or regulation. Because Mr. Helms established a *prima facie* case of reprisal, the investigation shifted the burden of proof to the Agency, requiring clear and convincing evidence that the personnel actions would have been taken absent Mr. Helms' disclosures.

We concluded the Agency:

1. provided clear and convincing evidence that Mr. Helms' access would have been suspended absent his disclosures; and
2. did not provide clear and convincing evidence that the Agency would have recommended revocation action absent the disclosures.

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<sup>1</sup> All titles and ranks identified pertained to the position(s) held at the time the incident took place and do not necessarily reflect an individuals' current rank or title.

Therefore, we substantiated that Mr. Helms' [REDACTED], [REDACTED] U.S. Army, [REDACTED], Bravo Company, 308th MI Battalion, 902nd MI Group, Fort Meade, acting on advice from officials at the 902nd MI Group, reprised against Mr. Helms. [REDACTED] was ultimately responsible for recommending his security clearance be revoked. Evidence established that [REDACTED] was relying primarily on the command-directed Army Regulation (AR) 15-6 investigation and guidance provided by the 902nd MI Group Legal office.

This report sets forth our findings and conclusions based on applicable evidentiary standards.

### BACKGROUND

The 902nd MI Group is located at Fort Meade, and provides direct and general counterintelligence support to Army activities and major commands.<sup>2</sup> It is a subordinate command of the United States Army Intelligence and Security Command (INSCOM).<sup>3</sup> INSCOM is an Army major command that conducts intelligence, security and information operations for military commanders and national decision makers. Headquartered at Fort Belvoir, VA, INSCOM has multiple smaller components staffed by personnel dispersed over 180 locations worldwide.<sup>4</sup>

Prior to Mr. Helms' employment as a civilian appropriated-fund employee, he enlisted as a counterintelligence agent in the U. S. Army in 1996.<sup>5</sup> He served in the 902nd MI Group, first as an enlisted soldier and then as a civilian employee.<sup>6</sup> He entered civilian employment with the 902nd MI Group as a Military Intelligence Civilian Excepted Career Program (MICECP) employee, GG-9 in May 2002.<sup>7</sup>

The MICECP program is a career program charged with recruiting, training, and developing a highly qualified, technically skilled, foreign language capable, mobile workforce. MICECP employees in the Intelligence Operations Specialist (0132) job series conduct intelligence and counterintelligence operational missions for Army commands worldwide.<sup>8</sup> The MICECP program is managed by INSCOM. Mr. Helms was assigned to the Fort Knox Field Office, 902nd MI Group, Fort Knox, KY, as the Operations Officer. The Fort Knox Field Office is headed by the Special Agent in Charge (SAC), who reports to the Bravo Company Commander at Redstone Arsenal in Huntsville, AL. The Bravo Company Commander reports to the 308th Battalion Commander in Fort Meade, MD. The 308th Battalion Commander reports to

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<sup>2</sup> INSCOM Website, <http://www.inscom.army.mil>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> DoD IG Interview of Mr. Helms (Sept. 25, 2009) at 6.

<sup>6</sup> Mr. Helms was enlisted from 1996-2001. He joined the 902nd as a MICECP on May 20, 2002. From September 11, 2001, until May 19, 2002, he was not associated with the Federal Government.

<sup>7</sup> DoD IG Interview of Mr. Helms (Sept. 25, 2009) at 7.

<sup>8</sup> MICECP Website, <http://www.inscom.army.mil/Employment>.

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the 902nd Group Commander, also in Fort Meade, MD. As an Operations Officer, Mr. Helms conducted counterintelligence operations investigations and counterespionage operations investigations that were assigned to the Fort Knox Field Office.<sup>9</sup> He also assumed information assurance (IA) responsibilities, which included management of the office's computer network.

In 2004 the 902nd MI Group deployed to Iraq. This deployment was unprecedented.<sup>10</sup> On June 16, 2004, Mr. Helms was injured by an Improvised Explosive Device (IED). He was medically transported to Walter Reed Army Medical Center on July 2, 2004.<sup>11</sup> Not being on active duty, Mr. Helms was informed that there were no rooms available for him. On July 6, 2004, he was refused treatment due to a coding error that identified him as a contract worker rather than a DoD employee.<sup>12</sup> Instead of being admitted to Walter Reed Army Medical Center, Mr. Helms slept on the floor at the guesthouse of his First Sergeant.<sup>13</sup>

Mr. Helms continued to be denied treatment at military treatment facilities.<sup>14</sup> In the course of attempting to obtain military medical treatment, Mr. Helms contacted several elected officials and members of the media for assistance. On September 18, 2007, and October 16, 2007, the House Armed Services Committee (HASC), Subcommittee on Oversight and Investigations, conducted hearings into the deployment of civilian U.S. Government employees in Iraq and Afghanistan. The committee sought to understand how well the Government fulfills its obligation to support and adequately compensate those who are asked to take these assignments.<sup>15</sup> The committee held two open hearings as well as a closed-door panel discussion on October 2, 2007, with wounded DoD civilian personnel.<sup>16</sup> Mr. Helms was one of the DoD civilians who testified at the informal panel discussion on October 2, 2007. On April 30, 2008, the subcommittee released its report, *Deploying Civilians to the Battlefield: Incentives, Benefits and Medical Care*. Among its findings, the Subcommittee found that:

the Department of Defense has policies, directives, and instructions in place for the provision of medical care to its civilian employees who serve in war zones in support of combat operations. However, these policies may not be sufficient to cover the full scope of the problems encountered; communicated to the entire workforce; implemented or understood by those responsible for supporting the

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<sup>9</sup> DoD IG Interview of Mr. Helms (Sept. 25, 2009) at 5-6.

<sup>10</sup> DoD IG Interview of [REDACTED] U.S. Army, [REDACTED] 902nd MI Group, Fort Meade (Jan. 21, 2010) at 5-6.

<sup>11</sup> DoD IG Interview of [REDACTED] [REDACTED] [REDACTED] Walter Reed Army Medical Center (Oct. 13, 2009) at 5.

<sup>12</sup> *Id.* at 5.

<sup>13</sup> *Id.* at 5.

<sup>14</sup> *Id.* at 9.

<sup>15</sup> HASC Report, *Deploying Civilians to the Battlefield* (Apr. 2008) at 10.

<sup>16</sup> *Id.*

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provision of medical care to wounded and injured civilians; or adequately overseen by military leaders.<sup>17</sup>

During the period from 2004 to 2008 when Mr. Helms was making disclosures, he was a MICECP employee assigned to the Fort Knox Field Office. Mr. Helms was the office Operations Officer and Information Assurance Manager. In 2005, Mr. Helms created a stand-alone server that he named "Athena" (hereinafter referred to as the Athena server). The Athena server stored all of the operational files for the Fort Knox Field Office. Four to five staff-members working at the Fort Knox Field Office had access to the server, could log onto it, and could retrieve and update files. A copy of office members' computer usernames and passwords was kept in the office safe where the staff could access them.<sup>18</sup> The Athena server was used only by the Fort Knox Field Office internally and was not on the 902nd MI Group domain.

In testimony during this investigation, members of the Fort Knox Field Office told us that commanders at Bravo Company and the 308th Battalion were aware of the Athena server.<sup>19</sup> As Operations Officer, Mr. Helms provided briefings to incoming commanders during which he explained how the Athena server worked.<sup>20</sup> On April 25, 2008, after three years of operation, the Athena server was shut down under the direction of the 902nd MI Group IA Office. The then-902nd Commander, [REDACTED] immediately ordered a Commander's Inquiry to determine if the Athena server was unauthorized.<sup>21</sup> [REDACTED] the 902nd [REDACTED] conducted the inquiry. [REDACTED] report, dated June 6, 2008, concluded that Mr. Helms operated an unauthorized computer system for approximately 3 years.<sup>22</sup> The Commander's Inquiry also concluded that [REDACTED], [REDACTED], 308th MI Battalion, Fort Meade, knew of the Athena server for 3 years.

In April 2008, the 902nd MI Group underwent a change of command. [REDACTED] U.S. Army [REDACTED] 902nd MI Group, Fort Meade, and [REDACTED], U.S. Army, [REDACTED], 902nd MI Group, Fort Meade, ordered an AR 15-6 Investigation on July 14, 2008, to investigate allegations of computer misuse at the Fort Knox Field Office.<sup>23</sup> Forensic analysis of the hard drives uncovered media files, containing sexually explicit material, stored on the hard drives. The AR 15-6 investigation was subsequently

<sup>17</sup> HASC Report, *Deploying Civilians to the Battlefield* (Apr. 2008) at 10.

<sup>18</sup> DoD IG Interview of [REDACTED] Fort Knox Field Office, 902nd MI Group, Fort Knox (Nov. 2, 2009) at 31.

<sup>19</sup> DoD IG Interview of [REDACTED] Bravo Company, 308th MI Battalion, Redstone Arsenal (Oct. 14, 2009) at 11-12; DoD IG Interview of [REDACTED] U.S. Army, White House Military Office (Oct. 29, 2010) at 41; DoD IG Interview of [REDACTED] U.S. Army, SAC, Fort Knox Field Office, 902nd MI Group, Fort Knox (Nov. 5, 2010) at 44-45.

<sup>20</sup> DoD IG Interview of [REDACTED] U.S. Army, Fort Knox Field Office, 902nd MI Group, Fort Knox (Nov. 2, 2009) at 31-32.

<sup>21</sup> AR 15-6 Investigation, *Exhibit 7* (Oct. 2008).

<sup>22</sup> *Id.*

<sup>23</sup> [REDACTED] and [REDACTED] testified that [REDACTED] ordered that the AR 15-6 to go forward. See DoD IG Interview of [REDACTED] (Jan. 21, 2010) at 12; DoD IG Interview of [REDACTED] (Jan. 21, 2010) at 12.

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expanded to include whether Mr. Helms placed pornography on a classified computer network. The AR 15-6 investigation concluded that Mr. Helms used unlicensed software to create the Athena server; that he improperly connected the Athena server to the classified computer network at the Fort Knox Field Office; that he improperly connected classified network computers to an unclassified/unaccredited Army Criminal Investigation Division (CID) computer; and that he placed malicious software and sexually explicit material on the Secret Internet Protocol Router Network (SIPRNet).<sup>24</sup>

### SCOPE AND AUTHORITY

Under the Inspector General Act of 1978, as amended, the DoD IG is responsible for improving the economy, efficiency, and effectiveness of the Department's operations through prevention and detection of fraud, waste, and mismanagement. To fulfill those responsibilities, Congress granted the DoD IG broad powers to conduct and supervise investigations relating to the Department's programs and operations. The DoD IG achieves this goal, in part, by acting upon information provided by federal employee(s) in investigations conducted under Section 7(a) and 8(c)(2) of the Inspector General Act. The DoD IG protects the confidentiality of sources providing information under the authority of Section 7(b) of the Inspector General Act.

DoD Directive 5106.01 mandates that the Inspector General "[m]aintain a whistleblower protection program in the Department of Defense that encourages personnel to report fraud, waste, and abuse to appropriate authorities; provides mechanisms for addressing complaints of reprisal; and recommends remedies for whistleblowers who encounter reprisal, consistent with applicable laws, regulations, and policies."<sup>25</sup> One component of this whistleblower protection program is to "[r]eceive and investigate... complaints of reprisal made by civilian appropriated-fund employees" consistent with Title 5, United States Code, Section 2302 (5 U.S.C. § 2302).<sup>26</sup>

Employees of the DoD are required to report "waste, fraud, abuse and corruption to appropriate authorities."<sup>27</sup> Title 5 U.S.C. Section 2302 (b)(8) provides protection to DoD employees who make a "protected disclosure." A protected disclosure is a disclosure of information the employee reasonably believes evidences a violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.<sup>28</sup>

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<sup>24</sup> Oct. 2008, AR 15-6 Report of Investigation, exhibit 2 (DA Form 1574).

<sup>25</sup> DoD Directive 5106.01 (Apr. 13, 2006) at 5.19.

<sup>26</sup> DoD Directive 5106.01 (Apr. 13, 2006) at 5.19.1.

<sup>27</sup> Executive Order 12731 (Oct. 17, 1990).

<sup>28</sup> 5 U.S.C. § 2302 (b)(8)(A)(i-ii).

Title 5 U.S.C., Section 2302 (a)(2)(A)(i) through (xi) lists personnel actions which, if taken, withheld, or threatened in reprisal for a disclosure, constitute “prohibited personnel practices.” These personnel actions include disciplinary or corrective action; a detail, transfer or reassignment; a performance evaluation; a decision to order psychiatric testing or examination; a decision concerning pay, benefits, or award; or any other significant change in duties, responsibilities, or working conditions.

Current guidance provides that the courts and the M.S.P.B. lack authority under title 5 to review security clearance determinations as personnel actions. Given the significance of such determinations to DoD employees, the DoD IG whistleblower protection program relies on the authority of subsections 7(a) and 8(c)(2) of the IG Act to review security clearance determinations as possible abuses of authority in the nature of reprisal. We have defined the following types of unfavorable personnel security determinations as reviewable:

A suspension, denial, or revocation of clearance for access to classified information, access to classified information, Special Access authorization (including access to Special Compartmented Information (SCI)); a recommendation to a Central Adjudication Facility or comparable entity to suspend, deny, or revoke clearance for access to classified information or Special Access authorization (including access to SCI); non-appointment to or non-selection for any other position requiring trustworthiness determination; and reassignment to a position of lesser sensitivity or to a non-sensitive position.<sup>29</sup>

We employ a two stage process in conducting whistleblower reprisal investigations. The first stage focuses on the alleged disclosure, personnel action(s) and/or unfavorable personnel security determination, and acting official’s knowledge. The second stage focuses on whether or not the Agency would have taken, threatened or withheld the personnel action(s) and/or unfavorable personnel security determination absent the disclosure. The first stage of the whistleblower reprisal analysis is held to a preponderance of the evidence.<sup>30</sup> “Preponderance” of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.<sup>31</sup>

In order to progress to the second stage of the investigative process, there must be sufficient evidence based on proof by a preponderance of the evidence to make three findings:

1. the complainant made a protected disclosure;
2. the complainant was the subject of an adverse personnel action and/or unfavorable personnel security determination; and

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<sup>29</sup> Office of the Inspector General, U.S. Department of Defense, DoD IG Authority to Investigate Security Clearance Determinations in the Context of Civilian Appropriated Fund Employee Reprisal (Apr. 22, 2010).

<sup>30</sup> 5 C.F.R. § 1209.7.

<sup>31</sup> 5 C.F.R. § 1201.56(c)(2).

3. the disclosure was a contributing factor in the personnel action and/or unfavorable personnel security determination.<sup>32</sup>

If a preponderance of the evidence supports the three findings above, the investigation will proceed to the second stage of the analysis. At that point, the Agency is afforded the opportunity to provide evidence regarding the allegations and specifically, evidence that would establish the Agency would have taken, withheld, or threatened the personnel action and/or unfavorable personnel security determination against the complainant absent the disclosure. The second stage of analysis is held to a clear and convincing evidence standard.<sup>33</sup> "Clear and convincing" evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than preponderance of the evidence, but a lower standard than beyond a reasonable doubt.<sup>34</sup>

To address the fourth element, we consider the following three factors for presence of "clear and convincing" evidence:<sup>35</sup>

1. the strength of the Agency's evidence in support of its personnel action and/or unfavorable personnel security determination;
2. the existence and strength of any motive to retaliate on the part of the Agency officials who were involved in the decision; and
3. any evidence that the Agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

We interviewed 22 witnesses, including the complainant, Mr. Helms, and the [REDACTED]. We also reviewed documentation provided by Mr. Helms, the Agency, and other independent sources.

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<sup>32</sup> This third finding may be established where the acting official had knowledge, actual or imputed, of the complainant's disclosure and the personnel action took place within a period of time subsequent to the disclosure, such that a reasonable person could conclude that the disclosure was a contributing factor in the decision to take the action. *Redschlag v. Department of the Army*, 89 M.S.P.R. 589, 635 (2001), review dismissed, 32 Fed. Appx. 543 (Fed. Cir. 2002) In deciding whether a personnel action occurred within a period of time sufficient to conclude the disclosure was a contributing factor, the probative value of the evidence may be affected by the passage of time. Weak but substantiating evidence may be sufficient to prove reprisal after a short time frame; stronger evidence may be required to prove reprisal over relatively longer time frames.

<sup>33</sup> 5 U.S.C. § 1221(e)(2).

<sup>34</sup> 5 C.F.R. § 1209.4(d).

<sup>35</sup> *Carr v. Social Security Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (stating it is appropriate to consider the strength of the Agency's evidence in support of its personnel action when determining whether the Agency has shown by clear and convincing evidence that it would have taken that action in the absence of the employee's disclosure).

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Mr. Helms had standing to file a Section 7 Complaint with the Defense Hotline because he was a full-time civilian employee of the DoD and his position was financed with appropriated funds.<sup>36</sup> We reviewed this complaint using as general guidance concepts consistent with title 5 U.S.C. Section 2302 (b)(8). Mr. Helms alleged that he was reprisal against for disclosing information that he reasonably believed evidenced a violation of law, rule, or regulation.

### CHRONOLOGY

On June 16, 2004, Mr. Helms was injured by an IED as a U.S. Army civilian deployed in Iraq.<sup>37</sup>

On September 20, 2004, Mr. Helms contacted the office of Senator Mitch McConnell, KY, alleging he was denied treatment at military treatment facilities, and requested assistance.<sup>38</sup>

On or about November 2004, Senator McConnell's office opened a case for Mr. Helms.<sup>39</sup>

On April 14, 2005, Mr. Helms contacted staff from the Senate Armed Services Committee (SASC) regarding denial of treatment and delayed compensation for injuries sustained in Iraq. The SASC asked for a briefing from INSCOM, Army Deputy Chief of Staff, and Office of the Secretary of Defense.<sup>40</sup>

On or about September 2005, Mr. Helms contacted Senators John Cornyn, TX, John D. Rockefeller, WV, William Frist, TN, and John McCain, AZ, regarding problems with the DoD and Department of Labor (DoL). His inquiries were forwarded to Senator McConnell and Representative Jim Bunning, KY.<sup>41</sup>

On or about September 2005, Mr. Helms sent e-mails to the President and Vice President of the United States alleging he was denied treatment at military treatment facilities. No action was taken as a result of these e-mails.<sup>42</sup>

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<sup>36</sup> Title 5 U.S.C. Appendix 3 § 7(A)(2008) (provisions by which a DoD employee may file complaints with the Inspector General).

<sup>37</sup> DoD IG Interview of [REDACTED]

<sup>38</sup> Letter from Mr. Helms to Sen. Mitch McConnell (Sept. 20, 2004).

<sup>39</sup> *Id.*

<sup>40</sup> E-mail from Mr. Helms to [REDACTED], SASC Staff Member, *Recontact* (Apr. 14, 2005, 7:31 a.m.).

<sup>41</sup> Letter from Sen. Cornyn to Mr. Helms (Sept. 7, 2005); Letter from Sen. Rockefeller to Mr. Helms (Sept. 13, 2005); Letter from Sen. Frist to Mike Helms (Sept. 29, 2005); Letter from Sen. McCain to Mr. Helms (Nov. 13, 2005).

<sup>42</sup> E-mail from Mr. Helms to George W. Bush, President of the United States, *Combat injured civilian in need of help* (Sept. 2005, 1:38 p.m.); E-mail from Mike Helms, Complainant to Richard Cheney, Vice President of the United States, *Combat injured civilian in need of help* (Sept. 2005, 1:22 p.m.).

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During 2005, [REDACTED] 308th MI Battalion, Fort Meade, was notified by [REDACTED] 902nd MI Group, Fort Meade about the Athena server.

On or about May 2006, Mr. Helms was ordered by the [REDACTED] U.S. Army, [REDACTED], 902nd MI Group, Fort Meade, to move to Fort Meade or be terminated. However, this order was rescinded after Mr. Helms' request for medical stabilization was approved.<sup>44</sup>

On or about May 2006, Mr. Helms filed a complaint with the Office of Special Counsel (OSC) alleging his command was attempting to reassign him as reprisal for communications with Congress.<sup>45</sup>

On or about June 2006, Mr. Helms contacted Senator Chuck Hagel's, NE, office regarding the denial of treatment at military treatment facilities.<sup>46</sup>

On or about June 2006, Mr. Helms filed a complaint with the Department of the Army Inspector General (DAIG) regarding the denial of treatment at military treatment facilities.<sup>47</sup>

On July 7, 2006, Mr. Helms filed a complaint with the INSCOM IG regarding the denial of treatment at military treatment facilities.<sup>48</sup>

On April 2, 2007, Mr. Helms contacted Brigadier General (BG) Michael S. Tucker, U.S. Army, Deputy Commanding Officer, Walter Reed Medical Center, regarding his denial of medical treatment at military treatment facilities.<sup>49</sup>

On June 7, 2007, Mr. Helms contacted Ms. Patricia Bradshaw, Deputy Under Secretary of Defense for Civilian Personnel Policy, Pentagon, regarding his denial of medical treatment at military treatment facilities.<sup>50</sup>

On July 25, 2007, an article about Mr. Helms, *Service Civilians and the Wounds of War*, by Ms. Ann Scott Tyson was published in *The Washington Post*.<sup>51</sup>

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<sup>43</sup> AR 15-6 Investigation, *Exhibit 3* (Oct. 2008) [REDACTED] could not remember the exact date [REDACTED] was notified about the server. [REDACTED] did not recall the conversation).

<sup>44</sup> OSC complaint MA-06-1711 (May 2, 2006).

<sup>45</sup> *Id.*

<sup>46</sup> DoD IG Interview of Mr. Helms (Sept. 25, 2009) at 21.

<sup>47</sup> *Id.* at 35.

<sup>48</sup> *Id.* at 35.

<sup>49</sup> *Id.* at 36.

<sup>50</sup> *Id.* at 37.

<sup>51</sup> Ann Scott Tyson, *Service Civilians and the Wounds of War*, *The Wash. Post*, July 25, 2007 at A1.

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On or about July 2007, Mr. Helms contacted the U.S. Army Joint Field Support Center (JFSC) and alleged that INSCOM violated Health Information Privacy Accountability Act (HIPAA) regulations by mishandling medical records.<sup>52</sup>

On October 2, 2007, Mr. Helms testified at a closed-door briefing in front of the HASC, Subcommittee on Oversight and Investigations regarding the denial of treatment at military treatment facilities and inefficiency of the DoL Office of Workers' Compensation Program (OWCP).<sup>53</sup>

On or about April 2008, the 902nd MI Group IA office alleged that the Athena server was a "rogue" server. [REDACTED] subsequently directed a Commander's Inquiry to investigate computer configuration.

On April 25, 2008, the Athena server was shut down under the direction of the 902nd IA Officer.<sup>55</sup>

On April 30, 2008, the HASC report, *Deploying Federal Civilians to the Battlefield: Incentives, Benefits, and Medical Care*, was published. One of the HASC findings was that military treatment facility staff do not understand the responsibilities of admitting civilians and submitting claims through the DoL OWCP.<sup>56</sup>

On May 5, 2008, Mr. Helms was quoted in a *Federal Times* article by Mr. Stephen Losey, *Wounded in war, ill-treated at home*.<sup>57</sup> In the article, Mr. Helms stated that he was refused treatment at Ireland Army Community Hospital, Fort Knox, and was charged \$2,500 for a treatment by a civilian doctor.

On May 5, 2008, General Dynamics contractors conducted a physical inspection of the Fort Knox Field Office computers.<sup>58</sup>

On May 20, 2008, Mr. Helms received verbal and written counseling from [REDACTED] U.S. Army, [REDACTED], 308th MI Battalion, 902nd MI Group, Fort Mead because of working over his six-hour-day limit.<sup>59</sup>

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<sup>52</sup> DoD IG Interview of Mr. Helms (Sept. 25, 2009) at 37-38.

<sup>53</sup> See *Wounded U.S. Civilians and their Professional Associations: Informal Member Session before the H. Armed Services Comm.*, 110th Cong. (2007) (statement of Mr. Helms).

<sup>54</sup> AR 15-6 Investigation, *Exhibit 3* (Oct. 2008).

<sup>55</sup> *Id.*

<sup>56</sup> *Deploying Federal Civilians to the Battlefield: Incentives, Benefits, and Medical Care*, H. Comm. Print No. 9 (Apr. 2008).

<sup>57</sup> Stephen Losey, *Wounded in war, ill-treated at home*, Fed. Times, May 5, 2008.

<sup>58</sup> AR 15-6 Investigation, *Exhibit 3* (Oct. 2008).

<sup>59</sup> Letter of Counseling from [REDACTED] to Mr. Helms (May 19, 2008).

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On or about May 2008, all hard drives at the Fort Knox Field Office were disconnected. Mr. Helms shipped nine classified hard drives from the Fort Knox Field Office to Fort Meade.<sup>60</sup>

On June 6, 2008, [REDACTED] reported [REDACTED] findings in the Commander's Inquiry. The report stated:

Since 2005, Mr. Helms of the Fort Knox field office has installed and operated an unauthorized domain called 'ATHENA' on the SIPRNet. This domain was implemented with the use of unlicensed Windows 2003 Server Software he obtained in Iraq and a variety of unauthorized Freeware and Shareware software he downloaded from the internet. In addition to the unauthorized domain, Mr. Helms also provided unauthorized SIPRNet connectivity to the local CID office by connecting a workstation for them to the field office SIPRNet network and providing user accounts via the unauthorized Athena domain;<sup>61</sup> and

It is apparent that Mr. Helms knowingly implemented this unauthorized Athena Domain, unauthorized CID connectivity to the FO's [Field Office's] SIPRNet network, and the use of unlicensed and unauthorized software. It is also apparent that the [REDACTED] [REDACTED] failed in [REDACTED] responsibilities to enforce required policies and regulations to ensure this field office was operating per prescribed Information Assurance and Security guidelines.<sup>62</sup>

On July 10, 2008, [REDACTED] sent a Serious Incident Report (SIR) to the Commanding General of INSCOM reporting the discovery of an unauthorized computer network at the Fort Knox Field Office.<sup>63</sup>

On July 11, 2008, a separate Initial Incident Report was reported to the Army Central Clearance Facility (CCF) stating:

[Mr. Helms] set up an unauthorized network on the SIPRNET system using potentially unlicensed/pirated software from 2005 until it was shut down by Information Assurance personnel on 25 Apr 08. The Commander has directed an AR 15-6 investigation.<sup>64</sup>

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<sup>60</sup> AR 15-6 Investigation, *Exhibit 7* (Oct. 2008); Classified Document Accountability Record, DA Form 3964, *Reg. No. 790500816767* (May 6, 2008).

<sup>61</sup> AR 15-6 Investigation, *Exhibit 7* (Oct. 2008).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at *Exhibit 8* (Oct. 2008).

<sup>64</sup> James M. Helms, JPAS Summary (July 11, 2008).

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On July 14, 2008, [REDACTED] appointed [REDACTED] [REDACTED] U.S. Army, 902nd MI Group, Fort Meade, to conduct an AR 15-6 investigation to look into whether Mr. Helms misused Government information technology (IT) systems, connected an unauthorized computer to a classified Government network, used unlicensed software on a Government computer system, connected unaccredited Criminal Investigation Division (CID) computers to a classified network, and compromised classified material.<sup>65</sup>

On August 18, 2008, the 902nd MI, Cyber Counterintelligence Activity (CCA), reported that they found pornographic files stored on the Athena server through their forensic analyses of the Fort Knox Field Office hard drives.<sup>66</sup>

On August 19, 2008, the scope of the AR 15-6 investigation was expanded to include whether Mr. Helms placed pornography on classified or unclassified systems.<sup>67</sup>

On August 27, 2008, Mr. Helms received a written counseling from [REDACTED] regarding derogatory information uncovered by the Commander's Inquiry. Mr. Helms' access to classified information was suspended and he was placed on Administrative Leave pending completion of the AR 15-6 investigation. A follow up incident report was sent to CCF, which included an allegation that Mr. Helms placed pornography on a classified government computer.<sup>68</sup>

On October 16, 2008, Mr. Helms received and signed a notice of proposed indefinite suspension stating that he was being suspended without pay for efficiency based on the suspension of his access to classified information.<sup>69</sup>

On October 24, 2008, Mr. Helms responded to the notice of proposed indefinite suspension and requested "Whistleblower Protection Status."<sup>70</sup>

On October 24, 2008, Mr. Helms filed a complaint with the DoD IG Hotline alleging reprisal for whistleblowing.<sup>71</sup>

On October 28, 2008, a follow up incident report was sent to CCF stating that Mr. Helms' local access to classified information was suspended.<sup>72</sup>

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<sup>65</sup> AR 15-6 Investigation, *Exhibit 1* (Oct. 2008).

<sup>66</sup> *Id.* at *Exhibit 13*.

<sup>67</sup> *Id.* at *Exhibit 1*.

<sup>68</sup> [REDACTED] Counseling for Derogatory Information for Mike Helms, (Aug. 27, 2008).

<sup>69</sup> [REDACTED] Notice of Proposed Indefinite Suspension, (Oct. 16, 2008).

<sup>70</sup> Mr. Helms, Response to Notice of Indefinite Suspension (Oct. 24, 2008).

<sup>71</sup> DoD Hotline Complaint 108920 (Oct. 24, 2008).

<sup>72</sup> JPAS Summary, *Mr. Helms* (Oct. 28, 2008).

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On November 25, 2008, [REDACTED] sent a signed memorandum recommending the revocation of Mr. Helms' Security Clearance to the 902nd Group Legal office.<sup>73</sup> This memorandum was not forwarded to CCF.

On December 3, 2008, an Adverse Action (Douglas Factors) checklist was completed by [REDACTED] proposing a 30-day suspension for Mr. Helms.<sup>74</sup>

On December 9, 2008, an Adverse Action checklist was completed by [REDACTED] sustaining proposed indefinite suspension without pay and subsequently notified Mr. Helms of [REDACTED] decision.<sup>75</sup>

On October 23, 2009, the DoD IG contacted the 902nd Security Office to inquire as to the status of Mr. Helms' security clearance, since Mr. Helms had not yet received a Letter of Intent (LOI) from CCF.<sup>76</sup>

On October 28, 2009, the final incident report was sent by the 902nd MI Group to CCF to begin adjudication of Mr. Helms' security clearance.<sup>77</sup>

On November 6, 2009, Mr. Helms was removed from federal service.<sup>78</sup> As of October 19, 2010, CCF has yet to make a security clearance determination. Further, they have yet to receive SF-50 notification that Mr. Helms was removed from federal service.<sup>79</sup>

## FINDINGS AND ANALYSIS

### **1. Did Mr. Helms make a protected disclosure? Yes.**

To determine whether a disclosure qualifies as protected, we employ a two step process based on statute and case law. First, we determine whether the communication fits within the definition of a disclosure under 5 U.S.C. Section 2302 (b)(8). Next, we determine whether the communication fits within the categories of protected disclosures recognized by the U.S. Court of Appeals for the Federal Circuit in *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1353 (Fed. Cir. 2001).

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<sup>73</sup> E-mail from [REDACTED] to [REDACTED] 902nd MI Grp, *Helms* (Nov. 25, 2008, 1:23 p.m.); MFR from [REDACTED] to CCF, Intent to Revoke Security Clearance (Nov. 25, 2008).

<sup>74</sup> [REDACTED] Douglas Factors Checklist (Dec. 3, 2008).

<sup>75</sup> [REDACTED] Douglas Factors Checklist (Dec. 9, 2008).

<sup>76</sup> DoD IG Interview of [REDACTED] [REDACTED] 902nd MI Group, Fort Meade (Oct. 29, 2009) at 13-14; CCF must forward a letter of intent (LOI) through the command security manager to the individual. This LOI will outline the derogatory information and explain the proposed action. It will offer the person a chance to reply in writing with an explanation, rebuttal, or mitigation for the incidents. AR 380-67, 8-201(a)(2) and 8-201(b).

<sup>77</sup> JPAS Summary, *Mr. Helms* (Oct. 28, 2009).

<sup>78</sup> [REDACTED], *Notice of Decision to Remove* (Nov. 6, 2009).

<sup>79</sup> E-mail from CCF to DoD IG, *Helms* (Oct. 19, 2010, 1:39 p.m.).

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Title 5 U.S.C. Section 2302 prohibits an Agency from taking, failing to take, or threatening a personnel action against a civilian employee, organized under Title 5 (appropriated fund), for making a protected disclosure. Section 2302 defines a protected communication as any disclosure of information, which the employee reasonably believes evidences:<sup>80</sup>

1. a violation of any law, rule, or regulation; or
2. gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

In *Huffman*, the U.S. Circuit Court of Appeals for the Federal Circuit outlined the following three categories into which a disclosure may fall. Only the latter two constitute disclosures that are protected under the Whistleblower Protection Act:

1. disclosures made as part of normal duties through normal channels;
2. disclosures made as part of normal duties outside of normal channels; and
3. disclosures made outside of assigned duties.

Additionally, to qualify as a protected disclosure under *Huffman*, the allegation of wrongdoing must be made to someone other than the wrongdoer.<sup>81</sup>

We identified 15 communications made by Mr. Helms:

1. On September 20, 2004, Mr. Helms contacted the office of Senator McConnell alleging he was denied treatment at military treatment facilities, and requested assistance.
2. On April 14, 2005, Mr. Helms contacted staff from the SASC regarding his denial of treatment and delayed compensation for injuries sustained in Iraq. The SASC asked for a briefing from INSCOM, Army Deputy Chief of Staff, and Office of the Secretary of Defense.

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<sup>80</sup> To satisfy this element the complainant is not required to disclose information that actually evidences one of those conditions. Rather, the complainant is only required to make a non-frivolous allegation that the matters disclosed were ones that a reasonable person in his or her position would believe evidenced one of those conditions. See *Rusin v. Dep't of the Treasury*, 92 M.S.P.R. 298, 318 (2002). See also *Garst v. Dep't of the Army*, 60 M.S.P.R. 514, 518 (1994). Reasonable belief is an objective standard. That is, a disinterested observer with knowledge of essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidence a violation of a law, rule, or regulation. See *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999); accord *Rusin*, *id.*

<sup>81</sup> *Huffman*, *supra*, at 1348-1350, citing *Willis v. Dep't of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998) and *Horton v. Dep't of Navy* 66 F.3d 279, 282 (Fed. Cir. 1995).

3. In September 2005, Mr. Helms contacted Senators Cornyn, Rockefeller, Frist, and McCain regarding problems with the DoD and DoL. His inquiries were forwarded to Senator McConnell and Representative Bunning.
4. In September 2005, Mr. Helms sent e-mails to the President and Vice President of the United States alleging he was denied treatment at military treatment facilities. No action was taken as a result of these e-mails.
5. In May 2006, Mr. Helms filed a complaint with OSC alleging his command was attempting to reassign him as reprisal for communications with Congress.
6. In June 2006, Mr. Helms contacted Senator Hagel's office regarding the denial of his medical treatment at military treatment facilities.
7. In June 2006, Mr. Helms filed a complaint with the DAIG regarding the denial of his medical treatment at military treatment facilities.
8. On July 7, 2006, Mr. Helms filed a complaint with the INSCOM IG regarding his denial of medical treatment at military treatment facilities.
9. On April 2, 2007, Mr. Helms contacted BG Tucker, Walter Reed Army Medical Center, regarding the denial of his medical treatment at military treatment facilities.
10. On June 7, 2007, Mr. Helms contacted Secretary Bradshaw, Deputy Under Secretary, Civilian Personnel Policy, regarding the denial of his medical treatment at military treatment facilities.
11. On July 25, 2007, *The Washington Post* published an article about Mr. Helms, *Service Civilians and the Wounds of War*, by Ann Scott Tyson in which Mr. Helms was quoted as stating he had been denied treatment at military treatment facilities.
12. In July 2007, Mr. Helms contacted the U.S. Army Field Support Center and alleged that INSCOM violated HIPAA regulations by mishandling medical records.
13. On October 2, 2007, Mr. Helms testified at a closed-door briefing in front of the HASC, Subcommittee on Oversight and Investigations, regarding the denial of treatment at military treatment facilities and inefficiency of the DoL OWCP.
14. On May 5, 2008, Mr. Helms was quoted in a *Federal Times* article by Stephen Losey, *Wounded in war, ill-treated at home*. In the article, Mr. Helms stated that he was refused treatment at Ireland Army Community Hospital, Fort Knox, and was charged \$2,500 for a treatment by a civilian doctor.

15. On October 24, 2008, Mr. Helms filed a complaint with the DoD IG Hotline alleging reprisal for whistleblowing.

We determined that all but one of Mr. Helms' communications, stated above, met the requirements under 5 U.S.C. Section 2302 and *Huffman*. Mr. Helms' communications from 2004 through 2008 to elected officials, congressional staff, senior DoD officials, and IGs constituted disclosures because they were made outside his chain of command, concerned matters outside his official duties, and concerned actions he reasonably believed constituted a violation of law, rule, or regulation. Additionally, 5 U.S.C. Section 2302(b) provides protection to DoD employees who make protected disclosures to Congress.<sup>82</sup>

We found that Mr. Helms' belief that DoD Directive (DoDD) 1404.10 was being violated in the course of his attempts to obtain treatment was reasonable. The version of DoDD 1404.10 in place at the time stated:

[Emergency Essential] employees who require treatment for disease or injury sustained overseas during hostilities may be provided care at no cost to the employee under DoD Military Health Services System. The scope of care provided shall be equivalent to that received by active duty military personnel.<sup>83</sup>

Mr. Helms was an emergency essential employee.<sup>84</sup> The testimony of Secretary Bradshaw, before the HASC Oversight and Investigations Subcommittee explained that this directive gave the employee the choice to elect treatment at a military treatment facility at no cost to the employee.<sup>85</sup> Additionally, testimony from 902nd MI Group personnel and personnel from DoD medical facilities supports the reasonableness of Mr. Helms' allegations.<sup>86</sup>

As an emergency essential employee, Mr. Helms was entitled to elect treatment at a military treatment facility for no cost.<sup>87</sup> Mr. Helms was denied treatment at military treatment facilities on several occasions from 2004 to the present. Additionally, 902nd MI Group employees were told before deployment that medical care would be provided should they be injured in theater.<sup>88</sup> Therefore, we find that Mr. Helms' belief that DoD policy was being violated when he was denied and/or charged for medical treatment was reasonable.

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<sup>82</sup> 5 U.S.C. § 2302(b) ("This subsection shall not be construed to authorize the withholding of information from the Congress or the taking of any personnel action against an employee who discloses information to the Congress.").

<sup>83</sup> DoDD 1404.10 (Apr. 10, 1992) at 6.

<sup>84</sup> Letter from GEN John F. Kimmons, U.S. Army, Commanding General, INSCOM, to Deputy Chief of Staff, G-2, *Benefits for Wounded/Injured Federal Employees* (Nov. 1, 2004).

<sup>85</sup> Prepared Statement of the Honorable Patricia Bradshaw, *Benefits and Medical Care Afforded to Civilian Employees Deployed to Iraq and Afghanistan*, " (Sept. 18, 2007).

<sup>86</sup> DoD IG Interview of [REDACTED] 308th MI Group, 902nd MI Group, Fort Meade (Dec. 3, 2010) at 12; DoD IG Interview of [REDACTED] (Oct. 13, 2009) at 5-6.

<sup>87</sup> DoDD 1404.10 (Apr. 10, 1992) at 6.

<sup>88</sup> DoD IG Interview of Mr. Helms (Sept. 25, 2009) at 10; DoD IG Interview of [REDACTED] (Dec. 3, 2010) at 12.

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We also find that Mr. Helms' communications to *The Washington Post* and *Federal Times* were protected. Disclosures to the press are protected under the WPA, as the press is a recognized outlet that may facilitate the correction of wrongdoing.<sup>89</sup> In these articles, Mr. Helms reported violations of DoD rules and DoL rules regarding medical treatment for civilians injured in combat zones. Specifically, these articles quote Mr. Helms as saying he was either denied or charged for treatment. Therefore, the disclosures in those news articles are also protected communications.

We found that Mr. Helms' July 2007 communication to the Joint Field Support Center was not protected because it was impermissibly vague. In order for a disclosure to be protected it must be sufficiently specific.<sup>90</sup> This communication was a broad complaint of the command generally mishandling information. Mr. Helms specified neither the officials that mishandled documentation nor what documents were missing. Therefore, this communication was not a disclosure within the meaning of the WPA.

Accordingly, we found that Mr. Helms made 14 disclosures.

**2. Was Mr. Helms the subject of unfavorable personnel security determinations? Yes.**

Mr. Helms alleged that seven actions were taken against him by commanders at the 902nd MI Group, Fort Meade. Those alleged actions are:

1. Threatening reassignment from Fort Knox to Fort Meade or termination;
2. Written Counseling concerning time management;
3. An AR 15-6 investigation;
4. Temporary suspension of access to classified information;
5. Indefinite suspension without pay;
6. Recommendation to revoke his security clearance; and
7. Termination.

Of the seven, we investigated two allegations:

1. The suspension of his access to classified information; and
2. The recommendation to revoke his clearance.

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<sup>89</sup> *Horton v. Dep't of Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995) (noting that disclosures to the press may be disclosures); H.R. Rep. No. 100-413, at 12-13 (1988) (listing the media as an independent entity, such as the Inspector General and Congress, to which disclosures may be made).

<sup>90</sup> *See Padilla v. Dep't of Air Force*, 55 M.S.P.R. 540, 543-44 (1992) (a protected disclosure must be specific and detailed, not vague allegations of wrongdoing).

For purposes of analysis, allegations one, two, five, and seven were not investigated by CRI because the complainant appealed those actions to the M.S.P.B. Action three is material to establishing the basis for the unfavorable personnel security recommendation in this case and will be analyzed as such.<sup>91</sup>

The suspension of access to classified information and the recommendation by [REDACTED] to the CCF to revoke Mr. Helms' security clearance are reviewable as unfavorable personnel security determinations. Therefore, we concluded that Mr. Helms was subject to two unfavorable security determinations: the August 27, 2008, suspension of access to classified information and the November 25, 2008, recommendation to revoke Mr. Helms' security clearance by [REDACTED]

**3. Did [REDACTED] have knowledge, actual or implied, of Mr. Helms' disclosures, and did the unfavorable personnel security determinations take place within a period of time subsequent to the disclosures, such that a reasonable person could conclude that the disclosures were a contributing factor in the decision to take the unfavorable personnel security determinations? Yes.**

We found by a preponderance of the evidence that the acting official did have knowledge of Mr. Helms' disclosures to a reporter with *The Washington Post* and to the HASC, and took unfavorable personnel security determinations within a period of time after the disclosures to conclude that the disclosures was a contributing factor. The 902nd MI Group Public Affairs Office would send out notifications when Mr. Helms appeared in the media, notifying commanders that Mr. Helms was in the news.<sup>92</sup> [REDACTED] testified that [REDACTED] knew of Mr. Helms' complaints regarding his medical care. [REDACTED] also testified that before [REDACTED] took command [REDACTED] became aware about a media article about Mr. Helms and that he testified before Congress.

Additionally, [REDACTED] personnel who influenced [REDACTED]' decision making confirmed that they were aware of Mr. Helms' disclosures both to the media and to the HASC. [REDACTED] testified that [REDACTED] was instructed by officials in the 902nd MI Group Legal office to suspend Mr. Helms' access to classified information and recommend the revocation of his security clearance.<sup>95</sup> [REDACTED], 902nd MI Group, Fort Meade, testified that [REDACTED] was aware of Mr. Helms' disclosures to a reporter with *The Washington Post* and the HASC.<sup>96</sup> [REDACTED] testified that [REDACTED] was also involved in the decision to suspend

<sup>91</sup> See *Mongird v. Dep't of Navy*, 33 M.S.P.R. 504, 507 (1987).

<sup>92</sup> DoD IG Interview of [REDACTED], 902nd MI Group, Fort Meade (Dec. 15, 2009) at 10.

<sup>93</sup> DoD IG Interview of [REDACTED] (Dec. 11, 2009) at 8.

<sup>94</sup> *Id.* at 9-11.

<sup>95</sup> *Id.* at 36.

<sup>96</sup> DoD IG Interview of [REDACTED] (Dec. 10, 2009) at 12-13.

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Mr. Helms' local access and [REDACTED] testified that [REDACTED] had knowledge of Mr. Helms' disclosures to *The Washington Post* and the HASC.<sup>97</sup>

[REDACTED] suspended Mr. Helms' access to classified information 13 months and two days after Mr. Helms' name appeared in *The Washington Post*; and 10 months and 25 days after Mr. Helms testified before Congress. [REDACTED] recommended to the CCF that Mr. Helms' security clearance be revoked 16 months after Mr. Helms appeared in *The Washington Post*; and 13 months after Mr. Helms testified before Congress. Therefore, we determined by a preponderance of the evidence that [REDACTED] had knowledge of the aforementioned disclosures and that these disclosures were a contributing factor in the personnel action.

**4. Is there clear and convincing evidence that the Agency would have taken, withheld, or threatened the unfavorable personnel security determinations against the complainant absent the disclosure?** No -- for the recommendation to revoke Mr. Helms clearance; Yes -- for the earlier decision to suspend his access.

In determining whether the Agency has established, by clear and convincing evidence, that the unfavorable personnel security determinations would have been taken, withheld, or threatened absent the disclosures, we consider three factors: the strength of the Agency's evidence in support of its personnel action; the existence and strength of any motive to retaliate on the part of the Agency officials who were involved in the decision; and any evidence that the Agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated. Clear and convincing evidence is that measure or degree of proof that produces in the mind of the finder of fact a firm belief as to the allegations sought to be established.<sup>98</sup>

We will first discuss the recommendation to revoke Mr. Helms' security clearance set forth in a memorandum signed by [REDACTED] on November 28, 2008, and then [REDACTED] earlier decision (August 27, 2008) to suspend his access.

#### ***Recommendation to Revoke Mr. Helms' Security Clearance***

We determined that the Agency did not establish by clear and convincing evidence that the recommendation to revoke Mr. Helms' security clearance would have occurred absent his disclosures. We base this determination on flaws in Agency evidence used to justify the recommendation to revoke, the existence of motive to reprise on the part of responsible Agency officials, and the disparate treatment of Mr. Helms when compared to another Agency official who also bore responsibility for the security lapses documented by the Agency.

<sup>97</sup> DoD IG Interview of [REDACTED] (Jan. 21, 2010) at 8; DoD IG Interview of [REDACTED] (Jan. 21, 2010) at 25.

<sup>98</sup> 5 C.F.R. § 1209.4(d).

Strength of Evidence in Support of the Unfavorable Personnel Security Determination.

We determined that the Agency's evidence in support of its action did not meet the clear and convincing standard because it was undermined by: (1) deficiencies in the conduct of the AR 15-6 investigation on which the recommendation to revoke Mr. Helms' clearance was based; (2) the Agency's failure to determine whether classified information was compromised as required by applicable guidance; (3) a material misstatement of fact in the correspondence to the CCF which recommended the security clearance revocation; and (4) the Agency's failure to timely forward to the CCF the recommendation to revoke Mr. Helms' security clearance, thereby depriving Mr. Helms of due process. We address these factors below.

The AR 15-6 Investigation

In [REDACTED] memorandum to the CCF dated November 25, 2008 (but not actually delivered until October 2009), [REDACTED] listed the following four reasons for [REDACTED] recommendation to revoke Mr. Helms' security clearance:

1. "On August 27, 2008, Mr. Helms had his local access to classified information suspended based upon derogatory information obtained during the course of an AR 15-6 investigation into allegations of misuse of Government information technology equipment. At the conclusion of the investigation, the allegations were substantiated and proven to be true."<sup>99</sup>
2. "The results of the AR 15-6 investigation confirmed Mr. Helms put inappropriate and pornographic photos, videos, and audio files onto a classified Government computer."<sup>100</sup>
3. "Mr. Helms admitted in his statement to the investigating officer he knew his actions were wrong and yet continued even after being told to cease by the Battalion IMO."<sup>101</sup>
4. "In addition to the misconduct itself, Mr. Helms received guidance on the applicable security regulations and policies within the 902d MI Group and the U.S. Army concerning use and misuse of Government information technology equipment, he demonstrated a pattern of disregard for these regulations and policies, and his irresponsibility causes me to question his judgment."<sup>102</sup>

While some of the conclusions reached in the AR 15-6 investigation are not in dispute, the manner in which the investigation was conducted is called into question. We found the

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<sup>99</sup> MFR from [REDACTED] to CCF, *Intent to Revoke Security Clearance* (Nov. 25, 2008).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> MFR from [REDACTED] to CCF, *Intent to Revoke Security Clearance* (Nov. 25, 2008).

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support for the Agency's reasons, as stated above, to be weakened by the failure to conduct a complete investigation.

AR 15-6 charges the investigating officer "to ascertain facts and to report them to the appointing authority. It is the duty of the investigating officer . . . to ascertain and consider the evidence on all sides of each issue, thoroughly and impartially, and to make findings and recommendations that are warranted by the facts and that comply with the instructions of the appointing authority."<sup>103</sup> The IO failed to comply with requirements in this case, to include:

- The IO was aware that Mr. Helms' superiors, to include Battalion and Group Commanders, were briefed on the Athena server during their visits to the Fort Knox Field Office.<sup>104</sup> Further, Mr. Helms mentioned [REDACTED] by name in his sworn AR 15-6 statement. However, the IO never interviewed those commanders, to include [REDACTED]
- Mr. Helms alleged in his sworn AR 15-6 statement that [REDACTED] granted a CID request to use the Field Office's SIPRNet and directed Mr. Helms to establish two accounts.<sup>105</sup> Again, the IO never interviewed [REDACTED]
- Mr. Helms alleged in his sworn AR 15-6 statement that "I am certain [REDACTED] [of the Athena server] told me to test the idea [REDACTED] to see if it worked." The IO never interviewed [REDACTED] and
- The IO failed to interview any of the Field Office personnel about the pornography matter.

The AR 15-6 investigation cites only four sworn statements: [REDACTED] [REDACTED] and [REDACTED].<sup>106</sup> The IO did not interview other witnesses at Fort Knox having access to the Athena server. Of particular concern is the fact that of the four sworn statements, only Mr. Helms mentions pornography. In his sworn statement, Mr. Helms denies placing pornography on the Athena server. The prudent investigator would have interviewed all witnesses with access to the server to verify the facts taken from the forensic report.

#### Failure to Determine Impact

Additionally, the AR 15-6 investigation failed to address whether there was a compromise of classified information, as required by applicable guidance and the direction of the appointing officer. Both DoD 5200.1-R, "Information Security Program," Chapter 10, and

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<sup>103</sup> AR 15-6 *Procedures for Investigating Officers and Board Officers* (Oct. 2, 2006) at 1-6.

<sup>104</sup> AR 15-6 Investigation, *Exhibit 7* (Oct. 2008), Exhibit (B) Mr. Helms Information Paper (Apr. 25, 2008), Exhibit (C) Mr. Helms Memorandum for Record (May 6, 2008).

<sup>105</sup> AR 15-6 Investigation, *Exhibit 14* (Oct. 2008).

<sup>106</sup> AR 15-6 Investigation (Oct. 2008).

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AR 380-5, "Department of the Army Information Security Program," Chapter 10, require the Command to immediately initiate a preliminary inquiry into a report of possible compromise of classified information.<sup>107</sup>

The failure of the 15-6 to address this question is notable for several reasons. First, the Command failed to comply with the requirements of DoD and Army guidance related to the handling of classified information and potential damage to national security. Second, the Command failed to follow-through on its representation to the INSCOM Commander, in the "Serious Incident Report," dated July 10, 2008, that the 902d MI Group AR 15-6 investigation will "determine potential of compromise and possible damage assessment." Third, the IO failed to comply with the direction of the appointing authority to answer, "Was there a compromise of classified material?" And fourth, whether or not Mr. Helms' actions actually compromised classified information would be a significant factor to be considered by both Command in its decision whether to recommend Mr. Helms' clearance be revoked and CCF in its revocation decision.

Despite the IO's failure to address the security impact of the Athena server, when justifying the actions taken regarding Mr. Helms' clearance, [REDACTED] and [REDACTED] emphasized the serious nature of the security violation.<sup>108</sup> [REDACTED] stated that Mr. Helms' activities were "undermining the integrity of the SIPRNet," while [REDACTED] noted that Mr. Helms' superiors might have shut down the server sooner "had they truly understood the vulnerability that was emanating from this office." However, when asked why an impact analysis was not conducted, their testimony indicated that determining the extent of the security impact was not a priority.<sup>109</sup> This assessment was impossible without knowing the impact of the security breach.

#### Material Misstatement of Fact

An additional irregularity is that [REDACTED]' memorandum to CCF misstates a crucial fact: that Mr. Helms admitted to the pornography allegation. [REDACTED] wrote that the 15-6 "also confirmed Mr. Helms put inappropriate and pornographic photos, videos, and audio files onto a classified government computer."<sup>110</sup> [REDACTED] further stated that Mr. Helms "admits in his statement to the investigating officer he knew his actions were wrong and yet continued even after being told to cease by the Battalion Information Management Office (IMO)."<sup>111</sup>

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<sup>107</sup> DoD 5200.1-R, "Information Security Program" (Jan. 1997) at C10.1.3; AR 380-5, "Department of the Army Information Security Program" (Sept. 2000) at 10-3.

<sup>108</sup> DoD IG Interview of [REDACTED] (Jan. 21, 2010) at 12, 22, and 28; and DoD IG Interview of [REDACTED] (Jan. 21, 2010) at 15-16, 25-26, and 30.

<sup>109</sup> DoD IG Interview of [REDACTED] (Jan. 21, 2010) at 17; M.S.P.B. testimony of [REDACTED] (Oct. 29, 2009) at 61; DoD IG Interview of [REDACTED] (Dec. 10, 2009) at 32; DoD IG Interview of [REDACTED] (Dec. 4, 2009) at 15-16; [REDACTED] (July 14, 2008).

<sup>110</sup> MFR from [REDACTED] to CCF, *Intent to Revoke Security Clearance* (Nov. 25, 2008) at subparagraph 1.b.

<sup>111</sup> *Id.* at subparagraph 1.c.

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In his sworn statement during the AR 15-6 investigation, Mr. Helms denied downloading and viewing pornography on a Government system and the AR 15-6 conclusions state in findings, "Mr. Helms . . . denies downloading pornography."<sup>112</sup> Moreover, Mr. Helms denied placing pornography on the system in his letter to [REDACTED] writing, "Let me state categorically, I neither created a 'rogue' connection or server as alleged or placed pornography of any kind on the hard drives that were reviewed for this inquiry."<sup>113</sup>

As part of this investigation, we arranged an independent forensic analysis of the evidence, conducted by Defense Criminal Investigative Service (DCIS). That examination served to reinforce Mr. Helms' denials regarding his placement of pornographic images on the Government computer<sup>114</sup>

DCIS confirmed the presence of the pornographic images and files, but determined that only two files were located in Mr. Helms' share profile. Additionally, they were located in the recycle directory, indicating they were deleted by Mr. Helms' account but not that they were placed on the computer by Mr. Helms' account. Another nine files were located in free space, not associated with any particular user, and the remaining 29 image files were located within the Fort Knox Field Office share folder. In short, the DCIS review determined that the pornography could have been loaded by any of those individuals who had access to the computer system. However, the CCA apparently did not consider this possibility and focused exclusively on Mr. Helms.

#### Failure to comply with procedural requirements for timely filing

Additionally, in evaluating the strength of the Agency's evidence supporting the recommendation to revoke Mr. Helms' security clearance, we reviewed whether the Agency followed its own regulations in pursuing the unfavorable personnel security determination.

When revoking an employee's security clearance, the employee is entitled to procedural protections provided by statute as well as regulatory protection provided by AR 380-67.<sup>115</sup> In order for CCF to carry out its regulatory requirements pursuant to AR 380-67, the command must provide CCF with the derogatory information "immediately."<sup>116</sup>

[REDACTED] and [REDACTED], [REDACTED] 902nd MI Group, admitted that Army regulations and INSCOM policy were not followed when recommending that the CCF revoke Mr. Helms' security clearance.<sup>117</sup> Mr. Helms' local access to classified information was initially

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<sup>112</sup> AR 15-6 Investigation, *Exhibit 14 and Exhibit 2* (Oct. 2008).

<sup>113</sup> Mr. Helms, Response to Notice of Indefinite Suspension (Oct. 24, 2008).

<sup>114</sup> MFR from [REDACTED] to DoD IG, *Review of 902nd MI GP Computer Forensic Examination* (Aug. 17, 2010).

<sup>115</sup> See *Drumheller v. Dep't of the Army*, 49 F.3d 1566, 1570 (Fed. Cir. 1995).

<sup>116</sup> DoD IG Interview of [REDACTED] (Dec. 10, 2009) at 45-47.

<sup>117</sup> We note that complainant has appealed his indefinite suspension of employment to the M.S.P.B. In ruling on the merits of the indefinite suspension, Administrative Judge Howard J. Ansoorge found that the Agency did comport with procedural requirements when suspending Mr. Helms based on the suspension of his access to classified

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reported through JPAS on July 11, 2008. Subsequent follow-up reports were entered into JPAS on August 27, 2008, and October 28, 2008. The AR 15-6 investigation was completed and signed by [REDACTED] in October 2008, and [REDACTED] signed a memorandum recommending that the CCF revoke Mr. Helms' security clearance on November 25, 2008. However, neither the results of the investigation nor the memorandum recommending revocation were sent to the CCF until 11 months later on October 28, 2009, after CRI inquired as to the status of Mr. Helms' clearance.

The failure to expeditiously provide CCF with these documents violates the requirements of AR 380-67, which call for processing derogatory information "immediately" and "timely."<sup>118</sup> [REDACTED] testified that there "was an error somewhere. As soon as these things happen they should be put into [JPAS]."<sup>119</sup> The 902nd MI Group Legal office also stated that the information should have been sent to CCF. [REDACTED] [REDACTED] stated in an e-mail, [REDACTED] should have signed the memo, sent it to CCF as that is who the memo is addressed to, and provided our office a copy of the signed memo."<sup>120</sup> Additionally, [REDACTED] indicated that it was only after [REDACTED] learned of the DoD IG investigation that the final information was sent to CCF.<sup>121</sup>

This deviation from Army regulation is significant because CCF holds a case in abeyance pending a command investigation. Since CCF never received a final notice that the AR 15-6 investigation was complete, they never issued a letter of intent (LOI) as required by AR 380-67. By not immediately sending information to the CCF, Mr. Helms was deprived of the procedural protections the adjudicatory process provides. Although Mr. Helms was generally aware of the derogatory information, without a LOI, he was unable to formally respond to the CCF.<sup>122</sup> This omission persisted for 11 months, during which Mr. Helms was unable to work because his local access had been suspended, and unable to regain his clearance because CCF was not adjudicating his case. Mr. Helms was removed from federal employment in November 2009, shortly after the final incident was entered into JPAS.<sup>123</sup> Mr. Helms has yet to receive an LOI and has not had the opportunity to present the CCF with rebuttal evidence.

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information. The Administrative Judge's decision determined solely whether the Agency complied with statutory requirements related to his indefinite suspension from employment. We determined that while the Agency did comply with the statutory requirements, it did not comply with its own regulatory requirements. The Federal Circuit held in *Drumheller* that the Agency must abide by its own regulatory procedures in order to afford an employee due process. See *Drumheller*, 49 F.3d at 1570.

<sup>118</sup> AR 380-67 (Sept. 9, 1988), § 8-101-102.

<sup>119</sup> DoD IG Interview of [REDACTED] (Dec. 11, 2009) at 29.

<sup>120</sup> E-mail from [REDACTED] to DoD IG, *Request for Clarification* (Jan. 7, 2010, 2:53 p.m.).

<sup>121</sup> DoD IG Interview of [REDACTED] (Oct. 29, 2009) at 13-14.

<sup>122</sup> The Federal Circuit held in *Drumheller v. Department of Army* "[t]he regulations, 8-201(a)(2) and 8-201(b), give the employee against whom action is to be taken an opportunity to reply to the derogatory information in the LOI." Since *Drumheller* was provided this opportunity, the Federal Circuit held that her due process rights were not violated. However, unlike in *Drumheller*, the 902nd, whether intentionally or negligently, thwarted the adjudicatory process by failing to enter a final incident report into JPAS.

<sup>123</sup> Mr. Helms was removed from federal employment based on the recommendation of the 902nd MI Group Commander who cited misuse of government technology and failure to follow orders as the reason for removal. Lance, *Notice of Decision to Remove* (Nov. 6, 2009).

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██████████ in ██████████ testimony, indicated that the 902nd MI Group Legal office gave ██████████ the impression that they were sending the information to the CCF.<sup>124</sup> ██████████ provided conflicting testimony. Initially ██████████ denied that ██████████ office was involved in forwarding the derogatory information.<sup>125</sup> However, when e-mail evidence indicated to the contrary, ██████████ stated that ██████████ office did play a role in forwarding the derogatory information.<sup>126</sup> According to Army regulation, the commander is ultimately responsible for forwarding the information.

Existence and strength of a motive to retaliate on the part of Agency officials who were involved in the decision.

██████████ testified that in deciding to recommend revocation of Mr. Helms' clearance ██████████ relied on advice and evidence presented by the 902nd MI Group. ██████████ decision-making was based on ██████████ conversations with officials in the 902nd MI Group Legal office. ██████████ testified that ██████████ was instructed by the 902nd Group Legal ██████████ to recommend the revocation of Mr. Helms' clearance. ██████████ also testified that ██████████ initially expressed concern that the decision was being made too fast.<sup>127</sup> ██████████ testified that ██████████ attributed ██████████ concern to the fact that the 902nd MI Group was privy to more information than ██████████ was.<sup>128</sup> Although ██████████ was ultimately the official responsible for recommending the revocation, officials at the 902nd MI Group were involved in the decision.<sup>129</sup> Therefore, we analyze evidence of motive pertaining to all officials involved in the action.

We found that the 902nd MI Group Command had motive to reprise against Mr. Helms. The evidence indicated that Mr. Helms' disclosures brought increased and arguably unwelcome scrutiny on the 902nd MI Group. ██████████ an employee of the 308th MI Battalion, who was assigned by the 902nd MI Group as Mr. Helms' medical advocate, testified:

**[OIG Investigator]:** Was there frustration more when ██████████ went to the press?

██████████ Of course there was. It was very trying because now you're getting higher headquarters coming down to you saying why aren't you taking care of this guy? I mean the frustration was two-fold. One, why aren't we doing

<sup>124</sup> DoD IG Interview of ██████████ (Dec. 12, 2009) at 25.

<sup>125</sup> DoD IG Interview of ██████████ (Dec. 10, 2009) at 48-49.

<sup>126</sup> E-mail from ██████████ ██████████ 902nd MI Group, Fort Meade, to ██████████ *Mr. Helms* (Nov. 20, 2008, 8:48 a.m.); and *see also* E-mail from ██████████ to ██████████ ("Our office was facilitating the forwarding of the derogatory information that is required to be forwarded per the INSCOM policy, as well as following the guidance from the OSJA INSCOM in advising our client, in this case ██████████").

<sup>127</sup> DoD IG Interview of ██████████ (Dec. 11, 2009) at 23.

<sup>128</sup> *Id.*

<sup>129</sup> DoD IG Interview of ██████████ (Dec. 11, 2009) at 23; *see also* DoD IG Interview of ██████████ (Jan. 21, 2010) at 20 - 26; and *see also* DoD IG Interview of ██████████ (Jan. 21, 2010) at 18-19 (testimony from ██████████ and ██████████ confirm that the decision to revoke Mr. Helms' clearance was initiated by the 902nd MI Group Command).

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enough for this guy? And two, why are we having higher headquarters coming and telling us how to do it...<sup>130</sup>

Additionally, Army officials were asked, on more than one occasion, to provide information to Congress or to higher level DoD officials on civilian deployments because of Mr. Helms' testimony.<sup>131</sup> For example, Mr. Helms' initial contact with SASC staff regarding his problems in obtaining medical treatment generated short-fused requests for information from the Office of the Under Secretary of Defense (OUSD) for Personnel and Readiness to the Army Deputy Chief of Staff for personnel (G1) and Headquarters, INSCOM. According to e-mail communications at the time, Army headquarters personnel were tasked to provide SASC staff a briefing on the Helms case.<sup>132</sup>

Similarly, in June 2007 Mr. Helms' complaint to Ms. Bradshaw, Deputy Under Secretary of Defense for Civilian Personnel Policy, generated significant e-mail correspondence between OSD, Army headquarters, and INSCOM personnel. In one such e-mail an OSD official noted that "Mr. Helms is a unique case, given the nature of his injuries and his many attempts to draw attention to his situation in the last two years."<sup>133</sup> In another e-mail an Army official noted that the Department of Labor had given Mr. Helms' case priority attention, "because of the furor raised by all the letters to high-level people."<sup>134</sup>

[REDACTED], [REDACTED] Bravo Company, 308th MI Battalion, testified:

There were times when the name of Mike Helms invoked a head back, rolling of the eyes at just the mention of his name. I know there are some that tried to help him. I know he got screwed at first, for the first maybe 18 months because I'm told the Army did not have something in place to handle this. But after probably 2 years of this, and again, I'm just repeating what I've been told from other people.<sup>135</sup>

Testimony from [REDACTED], [REDACTED] [REDACTED] 308th MI Battalion, established that Battalion and Group level officials attempted in the past to restrict Mr. Helms' interactions with the media. [REDACTED] testified that [REDACTED] was asked by the [REDACTED], 308th MI Battalion, to make sure Mr. Helms did not go to the media.<sup>136</sup>

<sup>130</sup> DoD IG Interview of [REDACTED] (Dec. 3, 2010) at 37.

<sup>131</sup> E-mail from Mr. Helms to [REDACTED] SASC Staff Member, *Recontact* (Apr. 14, 2005, 7:31 a.m.); and see also e-mail from [REDACTED] *Helms Letter to HASC* (Nov. 5, 2007, 12:27 p.m.).

<sup>132</sup> E-mail exchanges between HQ INSCOM, Army G1, and OUSD(P&R) during the period May 12-20, 2005.

<sup>133</sup> E-mail of June 18, 2007 from Director, CPMS

<sup>134</sup> E-mail of June 19, 2007, from Army HQ to INSCOM HQ.

<sup>135</sup> DoD IG Interview of [REDACTED] (Oct. 14, 2009) at 34.

<sup>136</sup> DoD IG Interview of [REDACTED] (Dec. 30, 2009) at 27.

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██████████ ██████████ may have said something to the fact of you need to make sure he's not reporting to the media, because I remember – whether it was reporting to the media or reporting to Congress – I basically told ██████████ . . . 'you can't stop somebody from doing this.'

**[OIG Investigator]** So ██████████ tried to ask you to prevent him [Mr. Helms] from talking to the media?

██████████ Right.

Further, we believe a certain lack of objectivity of the AR 15-6 investigation suggests a retaliatory motive. In this case, the *bona fides* of the AR 15-6 investigation are relevant because the results of the investigation were the reason cited by the command when recommending the revocation of Mr. Helms' security clearance. We find it probative that the investigation primarily focused on Mr. Helms' action, and not on command officials who had knowledge of the server, in some cases, dating back 3 years. Members of the Fort Knox Field Office were not interviewed and, therefore, the ██████████ ██████████, never learned that copies of office members' usernames and passwords were kept in the office safe where the staff could access them. ██████████ testified:

**[DoD IG Investigator]:** So I guess my question is how did you, how were you able to rule out all the other people in the office if. . .

██████████ I wasn't investigating the other people in the office . . .

**[DoD IG Investigator]:** Right.

██████████ . . . so if they did, in fact, misuse anything I wouldn't be privy to it because they weren't part of my investigation.

**[DoD IG Investigator]:** No, understood. I guess my question is how did you come to the conclusion that it was, in fact, Mr. Helms versus someone else using the computer under his login name or . . .

██████████ Look, I didn't even entertain the possibility that, you know, he was, it was someone else. I investigated Mr. Helms.<sup>137</sup>

Similar treatment as compared to other individuals who were non-whistleblowers, but otherwise similarly situated.

Another factor to consider in the determination of whether the Agency has established, by clear and convincing evidence, that its actions were appropriate is whether the Agency's actions are similar to those taken against other employees who are not whistleblowers, but who are otherwise similarly situated.

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<sup>137</sup> DoD IG Interview of ██████████ (Dec. 4, 2009) at 15-16.

We requested comparators from the 902nd MI Group. The 902nd MI Group was unable to provide a sufficient number of comparators. We then contacted INSCOM to broaden our sample size but were unable to obtain any additional examples.<sup>138</sup> Since an adequate sample could not be obtained, we determined that there is not enough evidence to reach a conclusion on the third comparator factor. If evidence does not exist as to one factor, a conclusion may be reached by weighing evidence presented on the first two factors.<sup>139</sup>

While there was insufficient evidence to conduct a comparator analyses, we find it noteworthy that [REDACTED], was given a Letter of Reprimand, but no action was taken with respect to [REDACTED] security clearance, following the AR 15-6's conclusion that [REDACTED] failed to report credible derogatory information as required, and that [REDACTED] knew of the Athena server over a 3 year period and failed to report it to the appropriate authorities.<sup>140</sup> [REDACTED] Letter of Reprimand cites a failure to follow rules and regulations over a 3-year period. [REDACTED] failure to follow rules and regulations should have been forwarded to CCF as derogatory information under adjudicatory guideline M (use of information technology systems), E (personal conduct), and AR 380-67, failure to follow regulations and questionable judgment.<sup>141</sup>

[REDACTED] testified that such derogatory information was not forwarded because [REDACTED] took responsibility for [REDACTED] actions and apologized, and [REDACTED] was not in the same position of responsibility as Mr. Helms.<sup>142</sup> However, [REDACTED] justification is appropriately considered by CCF as mitigating the derogatory information and does not justify the withholding of derogatory information from CFF.<sup>143</sup>

While action taken against [REDACTED] was performance-based, no performance based action was taken against Mr. Helms for his establishment of the unauthorized server and use of unauthorized software, other than counseling he received at the time his access was suspended. Instead, the command used the security clearance process as the means by which corrective action against Mr. Helms was taken.

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<sup>138</sup> MRF from INSCOM to DoD IG, *Response to Requests for Evidence Regarding Allegations Raised by Mr. Helms* (Dec. 30, 2009).

<sup>139</sup> *Carr v. Social Security Admin.*, 185 F.3d 1318,1323 (Fed. Cir. 1999); *Hernandez v. Dep't of Homeland Sec.*, SF-1221-09-0191-W-1, 2009 M.S.P.B. LEXIS 2305 (April 23, 2009) (third factor did not apply because no evidence existed on that matter. However, the Administrative Judge held that that the Agency met its burden by establishing strong evidence in support of its actions and absence of motive.); *Wadhwa v. Dep't of Veterans Affairs*, 2009-3167, 2009 U.S. App. LEXIS 25466 (Fed. Cir. 2009). (Where no evidence was introduced on the third *Carr* factor, the Appellate Court found that substantial evidence supported the Board's finding on the analysis of the first two factors.)

<sup>140</sup> [REDACTED] Memorandum of Reprimand for [REDACTED] (Feb. 23, 2009).

<sup>141</sup> DoD 5200.2-R, "Personnel Security Program" (Jan 1987); AR 380-67, "Department of the Army Personnel Security Program Regulation" (Sept 1988).

<sup>142</sup> DoD IG Interview of [REDACTED] (Jan. 21, 2010) at 14.

<sup>143</sup> DoD 5200.2-R, "Personnel Security Program" (Jan 1987); AR 380-67, "Department of the Army Personnel Security Program Regulation" (Sept 1988).

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*Suspension of Access to Classified Material*

We find that the Agency did provide clear and convincing evidence justifying the suspension of Mr. Helms' access.

Strength of Evidence in Support of the Unfavorable Personnel Security Determination.

██████████ stated reason for suspending Mr. Helms' access to classified information was derogatory information found during the Commanders' Inquiry.<sup>144</sup> The derogatory information was that Mr. Helms had installed and operated the unauthorized Athena server on the SIPRNet.<sup>145</sup> This information would fall within the adjudicatory guidelines for personal conduct where conduct for security clearance decision-making purposes pertain to conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations.<sup>146</sup> Based on the information contained in the Commander's Inquiry, it was appropriate for ██████████ to suspend Mr. Helms' access locally, pending the results of the AR 15-6 investigation.

██████████ testified that this was ████████ intention when ████████ decided to suspend Mr. Helms' local access:

I was one of them that said, along with the battalion commander, let's slow down. Let's make sure, you know, he gets to say his side of the story before I make a determination...Let me just do local access because if I suspend more than local access the only people that can reinstate it is CCF... If I do local access and this 15-6 comes back where Mr. Helms doesn't fall, this is unsubstantiated, I can reinstate it immediately and there's no lag time.<sup>147</sup>

Credible derogatory information is sufficient to justify the suspension of access. INSCOM Policy #32 states:

When a commander or security officer determines that they have evidence of credible derogatory information, the commander will ensure that such information is immediately reported to the CCF via the Incident Report link in JCAVS (JPAS). Concurrently, commanders will determine, based on the nature and severity of the information, whether or not suspension of the employee's access to classified information is warranted, and, if so, whether such suspension will be informal (local) or formal. Formal suspension of

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<sup>144</sup> ██████████ Counseling for Derogatory information for Mike Helms, (Aug. 27, 2008).

<sup>145</sup> ██████████ Review of the Fort Knox Field Office Unauthorized Network Configuration, Unauthorized Domain, and Unauthorized Use of Unlicensed Software (June 6, 2008).

<sup>146</sup> Personnel Security Program, DoD Regulation 5200.2-R.

<sup>147</sup> OIG Testimony ██████████ (Dec. 11, 2009) at 35-36.

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access must be reported to CCF as part of the required incident report.<sup>148</sup>

Thus based on the derogatory information presented to [REDACTED] suspension of Mr. Helms' access, pending further investigation, was appropriate.

Existence and strength of a motive to retaliate on the part of Agency officials who were involved in the decision.

Because the suspension of access pending adjudication of derogatory information is authorized by regulation, we find little basis to explore motivation for the decision in view of the circumstances of this case. That is, given the nature and severity of the actions detailed in the Commander's Inquiry, it was prudent to suspend Mr. Helms' access pending resolution of security issues and we found that basic procedural requirements were followed. As outlined above, however, the procedural irregularities that attended the more serious decision to recommend revocation of a clearance undermine the credibility of that decision.

Similar treatment as compared to other individuals who were non-whistleblowers, but otherwise similarly situated.

We did not obtain sufficient comparators and we rest our conclusion here on analysis above.

#### CONCLUSION

We did not substantiate the allegation that Mr. Helms' access to classified information was suspended in reprisal for making multiple disclosures.

We substantiated the allegation that the recommendation to revoke Mr. Helms' clearance was in reprisal for making protected disclosures.

#### RECOMMENDATION

We recommend that the 902nd MI Group consider taking appropriate remedial action with regard to Mr. Helms.

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<sup>148</sup> INSCOM Policy #32 at 7.

<sup>149</sup> AR 380-67, 8-102(Suspension); INSCOM Policy #32 at 7.

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